

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

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P/S
76-1110

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

Docket No. 76-1110

-against-

JOSEPH STASSI, a/k/a JOE
ROGERS, ANTHONY STASSI, and
WILLIAM SORENSON, a/k/a
BUBBY,

Defendants-Appellants.

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BRIEF FOR APPELLANT
WILLIAM SORENSON

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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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The jury knows the prosecution thinks your clients are guilty or they wouldn't have brought the case. The question is whether the prosecution's belief is correct. It is merely telling him the agent thinks he's got a case. It isn't something they don't know.....

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BRIEF FOR APPELLANT WILLIAM SORENSON

QUESTIONS PRESENTED

1. Whether the Court erred in admitting evidence of alleged acts and declarations of the appellant Sorenson and other, and of certain unindicted co-conspirators, which alleged acts and declarations occurred after the termination date of the conspiracy set forth in count one of the indictment.

2. Whether the court e-red in refusing to grant a new trial because of proof elicited by the government of multiple conspiracies, which proof constituted a denial of substantial rights of the appellant to a fair trial on the conspiracy charged in the indictment.

3. Whether government exhibit one, the prosecution's written agreement with witness Mario Perna is unconscionable, and violated the rights of the appellant to a fair trial, particularly when the prosecuting attorney, in his closing summation, argued that the jury should conclude that witness Perna was telling the truth in his testimony, because to do otherwise would void his agreement with the government.

4. Whether the Court erred in refusing to grant a mistrial after stating to the jury:

The jury knows that the prosecution thinks your clients are guilty or they wouldn't have brought the case. The question is whether the prosecution's belief is correct. It is merely telling him the agent thinks he's got a case. It isn't something they don't know.

5. Whether the Court erred in denying appellant a new trial when, after the verdict and before sentence, it was discovered that allegations of serious wrongdoing against agent James Bradley had not been furnished to the defense by the prosecution as material in the nature of exculpatory evidence.

6. Whether the court erred in admitting identification testimony of government witness Michel Mastantuono against the appellant, because of suggestion made during the photographic selection process by government agents, and thereby depriving appellant of a fair trial.

7. Whether the court erred in refusing to grant a mistrial when, after, without any notice from the government, two law enforcement officials entered the courtroom to escort the government witness Malfetta to the witness stand.

8. Pursuant to Rule 28 (i) of the Federal Rules of Appellate Procedure, the appellant Sorenson adopts by reference the points and arguments made by the other appellants insofar as they may have application to him.

STATEMENT PURSUANT TO RULE 28 (A) (3):

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Whitman Knapp) rendered on February 26, 1976 after a jury trial. The appellant was convicted of the crimes of conspiracy to import and distribute narcotic drugs in violation of 21 U.S.C. §§173, 174, 21 U.S.C. 812, 841 (a) (1), 841 (b)(1)(A), and 951 (a)(1) and 952 in Count I of the indictment; of importing narcotic drugs into the United States, in violation of 21 U.S.C. 173 and 174 in Count II of the indictment; of receiving, concealing, selling, and facilitating the transportation of narcotic drugs after importation into the United States, in violation of 21 U.S.C. 173 and 174, and 18 U.S.C. 2, in Count Three of the Indictment; of the importation in June, 1971, of a Schedule I narcotic drug controlled substance, in violation of 21 U.S.C. 812 and 841(a)(1) and 841 (b)(1)(A), in Count four of the indictment; and of the distribution and possession with intent to distribute a Schedule I narcotic drug controlled substance, in violation of 21 U.S.C. 812 and 841 (a)(1) and 841 (b) (1)(A), under Count V of the indictment.

The appellant was sentenced to serve a term of twenty years in the custody of the Attorney General on each of Counts I, II, and III of the indictment, these terms to run concurrently with one another. He was sentenced to serve terms of five years each on Counts IV and V, these period to run concurrently with one another. The twenty year term imposed on the first three counts and the five year term imposed on the last two counts were to run consecutively as to each other, making a total term of twenty-five years of custody. The appellant was also sentenced to serve ten year terms of special parole on counts IV and V, these terms to run consecutively with one another. A recommendation against early parole was made part of the Judgment and Commitment Order. *

The Court continued counsel on appeal, pursuant to the provisions of the Criminal Justice Act.

* The first three counts of the indictment, embraced events alleged to have occurred prior to May 1, 1971 the effective date of amendments of the federal narcotics laws. Hence, the first three counts of the indictment dealt with what are called "old law" violations and the last two counts, dealing with events occurring subsequent to May 1, 1971, are denoted as "new law" violations. The Government contended that the conspiracy charged commenced in early 1970 and continued until the end of 1972, thus spanning the effective dates of the amendments. A narcotics delivery in June, 1971, was the further basis for application of the amended statutory sections.

STATEMENT OF FACTS

1. Evidence of Criminal Activity during the
Time Period Stated in the Indictment.

In early 1970, Jean Claude Otvos,¹ an inmate at the Atlanta Federal Penitentiary, arranged to import pure heroin on a large scale with inmates Anthony Verzino and Mario Perna. Otvos, a Frenchman serving a federal sentence for narcotics offenses, offered to put his French sources in contact with domestic suppliers in league with Perna and Verzino. According to testimony, the two turned to a third inmate, appellant Joseph Stassi, for assistance (87).² Stassi recommended that his brother, appellant Anthony Stassi, handle the purchase and distribution of the imported heroin (90). The first step was for Anthony Stassi to travel to France, negotiate for price, for quantity, and for terms and method of delivery.

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1. An indicted co-conspirator paroled from Atlanta in January, 1975, and deported by the Government. The indictment by which the instant indictment was superceded in April, 1975, was pending at the time. Appellants argue that the Government, in deporting Otvos, deprived them of an essential right of confrontation of an essential figure in the alleged scheme. See Item A in Appendix.
 2. References to transcript pages will be made by the bare numeral contained in parentheses.

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Perna and Verzino testified that they secured the services of fellow inmate William Sorenson to assist Anthony Stassi. Sorenson, scheduled to leave Atlanta in March, 1970, was instructed to contact Anthony Stassi upon his arrival in New York (97). Sorenson was said to assist Anthony Stassi in importing the heroin and in looking after the share of narcotics that belonged to Perna and Verzino by delivering two percent of all heroin received to Verzino's girlfriend, Susan O'Neill. (97, 106).

In the spring of 1970, Anthony Stassi was said to travel to France to arrange for shipments of narcotics, carrying a letter of introduction, prepared on onionskin paper, from Otvos (90). He allegedly made contact with Otvos' people and ultimately received, with Sorenson's assistance, a number of large-quantity shipments of heroin (102-3). The heroin was concealed in automobiles, shipped from France into Canada and transshipped into New York by French couriers operating out of Montreal. One courier, Michel Mastantuono, was a government witness, who testified that he had delivered a total of four shipments of narcotics into New York, two of them to a group of men that included Stassi and Sorenson (2155-54, 2161-82). The price of the heroin was said to be \$10,500 per kilogram. (127).

Testimony indicated that the narcotics acquired in

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this fashion by Stassi and Sorenson was sold to and distributed by Ernest and Patsy Malizia, Albert Pierro³ and others. (110, 116). Perna and Verzino said that the deliveries were confirmed by Joseph Stassi in Atlanta and by Susan O'Neill, who said that Sorenson had delivered a total of ten kilograms to her as the share earned by Perna and Verzino for making the original contact with Otvos (330).

According to the Government, the first shipment of approximately one hundred twenty kilograms of heroin was delivered in two parts in the fall of 1970 (110). Michel Mastantuono testified that he delivered the first part to Stassi and Sorenson in October of that year (2135-54). Mastantuono, a native of Marseilles residing in Montreal, admitted sending a heroin-laden Citroen from France to Montreal (2118); the automobile had been purchased in France in the name of Mastantuono's girlfriend, Danielle Ouimet (2119), and had been packed with heroin by a mechanic located in Biarritz, France who worked for a narcotics trafficker named Jean Guidicelli, A/K/A "The Uncle".⁴ Mastantuono

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3. Mastantuono testified about a delivery in June, 1971, to a group of men at a house in New Jersey, including Anthony Stassi and William Sorenson. He identified Pierro as being present (2182), which tied in with other testimony that Pierro controlled Malizia's narcotics business after the latter went "on the lam" in early 1971.
 4. Also indicted, but never apprehended.

shipped the car to Montreal in Oulmet's name (2131), drove it to New York from Montreal and delivered the heroin it contained to Anthony Stassi, Sorenson, and others (2135-50).⁵

Delivery of that first shipment was made, according to Mastantuono, to the garage of a home located at 19 or 23 Holly Place, Larchmont, New York. (2144-5). Testimony indicated that the owners of those homes, both of whom testified at the request of other appellants, were acquainted with Anthony Stassi through their neighbor, Salvatore Autera, a pharmacist whose place of business was near Anthony Stassi's home.

Mastantuono testified that he delivered a second load of heroin to Stassi and Sorenson, among others, in June, 1971, at a house in New Jersey (See Footnote 3). The heroin had been packed in a Fiat automobile sent from France to Canada (2161), then had been transferred into a Ford station wagon owned by the witnesses friend, one Jean Cardon, who received \$10,000 for his assistance (2162). This delivery contained between eighty and ninety kilograms of heroin (2173). Mastantuono collected the money payment for the goods on the following day (2183-4) and returned to Canada.

5. Mastantuono testified that defendant Charles Alaimo was among the recipients of the October, 1970 and June, 1971 shipments; as to Alaimo, the jury could not agree upon a verdict.

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Masantuono's testimony about this second delivery was subjected to intensive cross-examination because he had, in late 1972, at the beginning of his cooperation, identified an entirely different group of men as having received the June, 1971 shipment. (2524-49).⁶

During the period of time when Masantuono was making these deliveries, in later 1970 - June 1971, Susan O'Neill, Anthony Verzino, and William Sorenson were said to become sources of concern to Joseph Stassi and Mario Perna, who were still in Atlanta Federal Penitentiary. Verzino spoke too freely about the business to other inmates, especially to Joseph Condello (127-8). Susie, who had a drinking problem, became inebriated at a wedding and began to brag about her lucrative business association (135-6). Sorenson, said to have earned anywhere from \$250,000 to \$400,000, was accused of spending his illicit profits on entertainment, travel, and gambling (137). According to Perna, he and appellant Joseph Stassi discussed the problem and formed a plan to kill the three people (138-140, 162-3), although "nothing ever came of

6. Masantuono testified that he had lied in earlier testimony and in earlier statements to law enforcement officials, and that the motive for the lie was his desire to protect Quimet, his girlfriend. The logic of the motive he claimed seemed ill-established by the testimony, and additional motive was furnished by Masantuono's stated desire to remain in the United States, a wish whose fulfillment was dependent on the goodwill of the Government.

the murder plot and none were harmed. The only actual murder attempt about which Perna testified was his attempt, in concert with Condello and another Atlanta former inmate, to kill Sorenson in October, 1972 - a murder planned not for business reasons but for reasons of personal pique (191-4).

It was in May of 1972 that Mario Perna was released from Atlanta Federal Penitentiary and returned to New York (165). Contacting appellant Anthony Stassi, Perna said that the men spoke about the deliveries of narcotics, about the difficulties with Sorenson, and about the possibility of a further trip to France that Stassi was planning. In the year and one-half before his arrest, however, Perna never received any heroin from either Stassi or Sorenson, although it was clear that he was a member of a prosperous heroin distribution partnership worth in excess of one million dollars at the time of his arrest. Perna testified that he and Ernest Malizia became partners in February, 1973, after the time frame outlined in the indictment had lapsed. Appendix A.7

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7. The government served defense counsel with a supplemental bill of particulars on September 18, 1975, three weeks before trial. The rationale for the incomplete allegation in the indictment as to time was that there was not sufficient time for the Government to draft proper allegations. It is the government's claim that the Court did not err in admitting voluminous testimony about 1973 acts and statements, even though the indictment did not include that year within its time period allegations; either as matter part and parcel of the conspiracy alleged, as subsequent similar acts. See Argument, infra.; Appendix B.

Anthony Verzino and Joseph Condello offered corroborative testimony about conversations taking place in the Atlanta Federal Penitentiary and involving appellant Sorenson and others. Verzino, although his contact with Sorenson was minimal,⁸ allegedly knew of Sorenson's activities through Mario Perna. Condello, an outsider, was primarily a friend of Mario Perna's, (794) and immediately upon his release from Atlanta joined Perna in an attempt to kill appellant Sorenson (191). Condello was supplied with heroin by the Malizia-Perna partnership (815). Verzino and Condello did offer somewhat contradictory testimony. While Verzino stated that he never spoke directly to Sorenson about the prospective shipments of heroin in March, 1970, (1374), Condello recalled that he had seen Verzino and Perna preparing Sorenson to join Anthony Stassi (769).

Verzino was released from Atlanta in August, 1973, and immediately joined Perna and Malizia as a full partner in the distribution of heroin. During the six months he was free before his arrest in February, 1974, he had no contact whatsoever with appellant Sorenson.

8. Verzino and Sorenson did not enjoy a cordial relationship. Verzino testified that he never spoke directly to Sorenson about the narcotics transaction, even in Atlanta (1374). And after he was released, he and Sorenson never saw one another until Verzino mounted the witness chair in court.

Verzino did testify about conversations he had with Mario Perna between August, 1973 and February, 1974, which implicated Sorenson in a range of other criminal activities. (1374-5). In so doing, he corroborated testimony given by both Perna and Condello about Sorenson's alleged wrongdoing far beyond the date of conspiracy alleged in the indictment, the time period during which it was said to be active, and far beyond evidence of criminal activity said to be the fruit of the original criminal understanding.

Former inmate Condello mentioned a number of conversations at which he said he was present in which the plan to import heroin was discussed in early 1970. (769, 779, 780). He said he heard appellant Joseph Stassi speak about the deal as well. Condello testified that he heard Anthony Verzino, and Perna prepare Sorenson to join Anthony Stassi upon his release from jail in 1970 (771, 779), and recalled that Mario Perna had told him at a time "when it was warm" (779) about the success of the venture. His impression was that 100 or 150 kilograms of heroin were involved. (780).

2. Evidence of Criminal Activity After the
Time Period Stated in the Indictment - Other
Crimes - Other Conspiracies.

A. The Last Acts in 1972.

These three government witnesses, Mario Perna,

Anthony Verzino, and Joseph Condello, testified about events in 1973-4 about which defense counsel had registered early disapproval.⁹ They were joined by Drug Enforcement Administration Agent James Bradley, who along with testifying about conversations he overheard himself about narcotics transactions, implicated appellant Sorenson in a range of criminal activity far beyond that alleged in the indictment and far beyond the scope of the conspiracy charged.

As if to underlie the lack of vitality of the original charged conspiracy, Mario Perna spoke with Anthony Stassi in September, 1972. Condello accompanied Perna to the Casa Del Monte to watch and to furnish protection. While Perna said that Stassi said that he was going to France and promised to telephone him upon his return, the men had no further contact during 1972, that is, during the time period alleged in the indictment. The Perna-Stassi meeting at the Casa Del Monte occurred a scant month before Perna and Condello testified that they attempted to murder appellant Sorenson.

B. 1973-4 Meetings and Conversations -
Other Crimes and Other Conspiracies.

The government introduced controversial testimony

9. See Argument, infra, p.

about events, meetings, and conversations allegedly occurring in 1973. It is this testimony, about events after the period of time specified in the indictment, that introduced to the jury highly inflammable evidence of a variety of criminal activities tending to demonstrate nothing more than criminal character and criminal tendencies on the part of appellant Sorenson; the evidence was not probative of the original understanding charged, serving only to poison the atmosphere against the appellant. Some of the material directly involved Sorenson; some did not. It became clear, for example, that witness Perna formed a heroin dealing partnership with Ernest Malizia in February, 1973, at the Evergreen Bar in Brooklyn, Sorenson's Bar (225). This arrangement between Perna and Malizia did not involve Sorenson. Still, it became clear to the jury that Sorenson, though not a partner, was present when the men became partners, a detail of criminal association rendered even more inflammatory when the Government introduced evidence implicating appellant Anthony Stassi and William Sorenson in other criminal conspiracies with Perna and Malizia. In March, 1973, for example, Perna testified that he again met with appellant Anthony Stassi at the Casa Del Monte Restaurant, the first time in about seven months that the men had contact, according to the testimony. Malizia, Perna's new partner, accompanied Perna in order to collect an alleged \$15,000 racetrack debt owing Malizia from Stassi (208). Stassi asked

Malizia to leave, since Malizia was wanted by the authorities (201). Perna remained in the restaurant, and testified that he spoke with Stassi about a deal for "Mexican goods", i. e., heroin produced in Mexico (201). According to Perna, the men formed a plan to import and distribute Mexican heroin, Stassi to arrange the importation, and Perna and Malizia to purchase and distribute the merchandise (203). The record is barren of any mention of appellant Sorenson with regards to this scheme. Still, during the same conversation, Sorenson's name was mentioned almost incidentally, and Perna said that appellant Anthony Stassi discussed his plans to go to France, as follows:

"I told him (Stassi)", the witness testified, "that Malizia and I would take any Mexican goods he could get, that we understood what it was and we could use it. He said I think I may come back with a better deal. I am leaving in a few days for France, he said, and if everything worked out well, I will have a load for you when I come back from France. (203)

Sorenson's name comes up in almost offhand fashion during this discussion of separate conspiratorial activity.

Perna testified that Stassi told him that

"I've been down to see my brother, and as far as that thing with Sizoo and Bubby, I was told to forget about it, don't do anything about it. I was supposed to tell you to leave it alone (203-4).

Thus did the government tie in the murder plot aspect of the original conspiracy with the additional and new criminal understanding. After leaving the restaurant, Perna, Malizia, and Stassi, spoke in the street. Malizia was concerned that Stassi had not brought in the heroin from Mexico (205); Stassi's justification was that he "wasn't in touch with you up until now". The three men agreed to speak later on about the new French heroin deal (205).

While the arrangement for Mexican heroin seemed to die stillborn, there were, according to Perna, further conversations about the French transaction. In late March or April, 1973, Perna, Malizia, Sorenson, and Stassi, met in Brione's Restaurant, in Brooklyn (213-4). Stassi said that he had been to France and was attempting to arrange a steady shipment of ten to twenty kilograms of heroin every month (214).

The question was whether the Perna and Malizia could pick up the heroin in Canada, at a price of \$19,000 per kilogram (214-5). Perna testified that Stassi claimed that he was planning another trip to France.

One week later the men met again to finalize arrangements. Perna and Malizia were to pay \$21-22,000 per package (kilogram) in advance of delivery; (217) Sorenson

was to receive the money, take it to Canada to pay the French (218), and Perna and Malizia were to pick up the goods in Canada. Sorenson, according to Perna, asked a higher price for the heroin than Stassi had requested (218-9).

The arrangement never reached fruition, neither Perna nor Sorenson allegedly hearing anything further from Anthony Stassi, although Perna delivered \$25,000 to Stassi as payment in advance ().

After these meetings, Sorenson, Perna, and Stassi had no personal contact, according to testimony. In August, 1973, Anthony Verzino was released from the Atlanta Federal Penitentiary and joined the Malizia-Perna partnership (221-3)¹⁰. In September, Sorenson called Perna, asked him to visit, and borrowed \$2,000 from Perna (220-1); the money came from Perna's partnership funds (220).

The arrangement for the delivery of French heroin was never consummated.

Another conspiracy about which the Government introduced evidence was a conspiracy to harbor the fugitive Joseph Condello in October, 1973, a crime in which Sorenson,

10. The Verzino-Perna-Malizia combine did not involve any of the defendants on trial (224).

Perna, Malizia, and Condello himself participated, according to testimony. In October, 1973, Perna testified that Sorenson telephone him, asking him to come to his apartment in Brooklyn to see Joseph Condello (225). Condello, one of Perna's regular customers for narcotics, but a person who received no drugs from Sorenson at all, had been arrested in New Jersey and was preparing to jump bail and to go "on the lam". (1055).

Condello put it this way:

He (Sorenson) had told me previously if I ever wanted to go on the lam or needed an apartment to get away from something, don't hesitate to ask (1055).

And Condello had admitted to Sorenson that he had tried to kill him "while I was living there on the lam (1055)".

Condello testified about several narcotics conversations with Sorenson. He testified that Sorenson discussed Anthony Stassi's latest trip to France, mentioning that Stassi was

"trying to arrange things to have a shipment come through . . . he (Sorensen) told me Mario wasn't getting nothing, that he was cut out. Like, in other words, he didn't specify to me who his customers were. There was no involvement there (819)".

Perna, visiting the Ovington Avenue apartment in

order to render assistance to the fleeing Condello, raised the specter of yet another narcotics conspiracy for the jury to consider:

"I asked Joey Condello what he was doing at that time with Bubby. He said that he had been arrested in Jersey, that he had made bail, and he didn't want to go to jail, that he intended to go on the lam, to run away . . . he needed money. Between Malizia and I we got together about \$1,5000 and we gave it to him . . .

Malizia then asked Sorenson if Sorenson had any goods on him at that time. Sorenson said he didn't, but that he knew someone who did and that it was cut goods, it was diluted, and he named a ridiculous price (225).

Objection and motion for mistrial was duly made by counsel on the basis of this testimony "not within the scope of the alleged conspiracy", and "tending to show that Mr. Sorenson was dealing in narcotics and in other areas" (225).

The Court permitted the Government to withdraw the question, remarking that "If you withdraw the question, I don't think it's prejudicial (sic) in the context of this case". (225-6) How the evidence of multiple and varied narcotics conspiracies was not "prejudicial" - especially at that early stage in the trial - is hard to imagine.

Anthony Verzino, who was also a government witness, also testified about events in 1973 and 1974, in addition to

offering testimony about the formation of the scheme to import narcotics developed in the Atlanta Federal Penitentiary. While his contact with appellant Sorenson was minimal, Verzino was a partner of Ernest Malizia and Mario Perna in the distribution of heroin, commencing upon his release from Atlanta in August, 1973, and continuing until his arrest six months later.

Verzino testified about events occurring during his six months of freedom, incriminating Sorenson well beyond the allegata in the indictment and, in corroborating testimony of both Condello and Perna, presenting the jury with additional evidence of Sorenson's bad character and criminal tendencies. (1374-5).

Recalling when Condello went "on the lam", Verzino testified as follows:

"But he (Mario) said that Joe Condella had taken it on the lam, he had gone away and that he had called Mario up and asked for some money, I think four thousand, I am not sure.

He said that he was staying by Booby, that Joe was staying by Booby or intended to go out to Booby's

"I am sure that Mario did (give money to Condello at Sorenson's house), because later Mario told me that he had had a conversation with Joey concerning Booby, some remark that Booby passed to him in which Booby said that if he got any more goods, that Mario and them would be last on line and the highest prices"
(1375)

Witness Perna had introduced still further evidence of incomplete conspiratorial behavior when he testified about a trip he made to Florida, in December, 1973. The witness testified that while in Florida, he and Malizia tried to speak with Anthony Stassi

"to find out what had happened to the load he was supposed to get in from Canada, but we hadn't heard from him in all this time. We tried to contact him. We called different numbers that we had but we weren't able to reach anybody. . . ."

Impressed by the number of different criminal transactions and conversations about criminal activity the Government introduced into evidence, the Court found it necessary to instruct the jury in cautionary fashion:

"You are involved in this case only with such transactions as may be related to or the fruit of the original understanding, if you find that original understanding to have been made. . . . This witness, as he has told you, admits to being engaged

in a various variety of other narcotics transactions. Those transactions have nothing to do with this case and they are only referred to insofar as may be necessary to explain his conduct, the conduct of other people in relation to the accusation (emphasis supplied), the facts with which this case is concerned (230, 231)."

Testimony of other crimes was also elicited through Agent Bradley as well. Agent James Bradley, of the Drug Enforcement Administration, testified that he had worked with Joseph Condello when the latter became a government informant in late 1973. "I had heard that Bubby wasn't getting any goods . . .", the Agent stated on direct examination, "and Perna stated that it was all wrong, that information. He stated that himself and Malizia had attempted at one time to get goods from Tony Stassi, but the pickup would have to be in Canada and they would have to from \$25,000 a kilo. But the deal fell through completely. He stated further that Tony Stassi had borrowed money from loan sharks and was in debt." Objection was duly made (1109-11), on a number of bases by all counsel, including that of multiple conspiracy, and the introduction of evidence "tending to show criminal character" (1110).

3. Agreement to Testify Truthfully:

Mario Perna signed a written, contractual agreement with the Government setting forth the conditions under which he would testify, and the conditions the government was obligated to satisfy in regard with him. Appellant Sorenson objected to the introduction into evidence of certain portions of that contract, and did so in timely fashion, at the invitation of the Court (263).

Appellant Sorenson objected to that portion of paragraph One and to all of Paragraph Two of the agreement, which, appellant claims, constituted government vouching of the witnesses credibility. (263-4). It is appellant Sorenson's position that the wording of the agreement constitutes an undue vouching for the credibility of Witness Perna.

Appellant Sorenson's objection to that portion of the written agreement is especially telling in view of the prosecution's summation, which placed the Government's credibility directly behind its witnesses.

All of the government witnesses were subject to impeachment by virtue of substantial and serious criminal activity, by virtue of hope of lenient treatment in return for testimony given, and by inconsistencies in prior statements given to government agents and made in prior testimony in this trial. Verzino and Perna faced long terms

of imprisonment both in Federal and in State court; both were indicted in local courts and stood to receive punishment of fifteen years to life as a minimum; with testimony, and cooperation, this sentence could be reduced to as little as one year served.

Objection to testimony about multifarious separate conspiratorial activity was duly made at length (208-213). Grounds raised by defense counsel included objections to testimony about the \$15,000 gambling debt from Stassi to Malizia (208), about testimony about the Mexican heroin transaction discussed by Stassi, Malizia, and Perna (211), all occurring in the spring of 1973. Counsel registered their alarm, as had been done at the beginning of taking of testimony, at the abuse resulting from the Court's admitting testimony about 1973 conversations and incomplete, yet separate, criminal understandings (211,212).

ARGUMENT

POINT I

WHETHER THE COURT ERRED IN ADMITTING EVIDENCE OF ALLEGED ACTS AND DECLARATIONS OF THE APPELLANT SORENSON AND OTHERS, AND OF CERTAIN UNINDICTED CO-CONSPIRATORS WHICH ALLEGED ACTS AND DECLARATIONS OCCURRED AFTER THE TERMINATION DATE OF THE CONSPIRACY SET FORTH IN COUNT ONE OF THE INDICTMENT.

Proceedings in this case were first initiated in April, 1973, when appellant Anthony Stassi was named as a defendant in indictment number 73 Cr. 403; it was alleged that the conspiracy with which Stassi was charged commenced in May, 1970, and extended to October 15, 1970. Thereafter, by two superseding indictments, S 75 Cr. 395 and S 75 Cr. 502, other defendants, including appellant Sorenson, were added and the scope of the conspiracy alleged was enlarged, commencing in January, 1970, and extending to December 31, 1971. The last superseding indictment was returned on May 23, 1974.

In response thereto, appellant Sorenson filed a

motion for a bill of particulars, as did other defendants; Sorenson was permitted as well to join in the application of other defendants for discovery relief.

On or about August 22, 1975, the defendants received a response for their demands for a bill of particulars from the Government. The August, 1975, particulars made available to the defendants by the Government made no reference whatever to conspiratorial acts or other criminal acts beyond the date alleged in the indictment, December 31, 1972.

Preparation for trial, which was scheduled to commence on October 6, 1975, proceeded upon the basis of the particulars made available by the Government.

On or about September 18, 1975, less than three weeks before commencement of the trial, the prosecution served a "Supplemental Bill of Particulars" upon the defense. For easy reference, copies of the bill of particulars and the supplemental bill of particulars are listed in Appendix D and E, respectively. Timely pre-trial objections were made to this Supplemental Bill of Particulars, the defendants claiming that notice given of such damaging testimony only three weeks before trial was insufficient, and that use of testimony of allegedly conspiratorial acts, and acts relating to narcotics transactions in general, would have deprived defendants of a

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fair trial. The defendants argued, in addition, that the Government should have been limited to introducing evidence relating to the years listed in the indictment. The Court ruled against the defendants on both contentions.

Upon the commencement of taking testimony from witness Mario Perna, the first government witness, counsel for all defendants renewed their objections to the taking of evidence about conversations and meetings allegedly occurring during 1973. In support of its position, the Government submitted a Memorandum Law in support of its advocacy of the admissibility of this testimony. Appendix B.

This evidence of alleged conspiratorial acts and conversations about any number of transactions relating to trafficking in narcotics became so voluminous as to overshadow the testimony about events charged in the indictment and completely tainted the jury's perspective about the crimes alleged to result from the original criminal understanding. The prosecution, in an effort to present the jury with every possible particle of evidence tending to demonstrate the bad character of the accused, continually and in great detail elicited testimony about events occurring after December 31, 1972. Perfect examples of this kind of muddying the waters to divert the jury's attention from the problems implicit in prosecuting a conspiracy whose main acts allegedly occurred

almost five years in the past are set forth in detail in the Statement of Facts in this brief. These acts include testimony about other and separate narcotics conspiracies, attempts to harbor fugitives, murder contracts, and a range of association testimony designed to establish that the defendants were acquainted with one another and with the Government witnesses throughout the years 1973 and 1974. A further example can be found in the Government's having introduced appellant Sorenson's telephone records in Exhibit in evidence, demonstrating that he was recorded as having made a telephone call to Paris, France, in late 1973; this evidence was particularly damaging in view of the Prosecutor's commenting upon the call - no evidence was elicited as to when the call was made. The Court, making indiscriminate provision for admissibility of this evidence, committed error.

The appellant's position is that the Court committed error in permitting the government to go far beyond the bill of particulars originally furnished the defendants and far beyond the dates of the conspiracy alleged in Count One of the Indictment. Evidence introduced relating to 1973 and 1974 events even went beyond the material the Government stated it would prove in its Supplemental Bill of Particulars.

The Government should be strictly limited to proving what it has set forth in its bill of particulars. United

States v. Neff, 212 F.2d 297, 309 (3d Cir., 1954); United States v. Murray, 297 F.2d 812, cert. den. 369 U. S. 828

The bill of particulars has a three-fold purpose. It apprises a defendants of greater detail of charges made against him in order to avoid prejudicial surprise at trial, enables him to made adequate defense preparations, and protects him against double jeopardy problems. Pipkin v. United States, 243 F.2d 491 (5th Cir., 1957); Braden v. United States, 272 F.2d 653 (5th Cir., 1960). Evidence introduced outside the Bill of Particulars at trial should be suppressed. Gordon v. United States, 438 F.2d 858, 874 (5th Cir., 1971).

The Government introduced at trial highly inflammable and prejudicial testimony about narcotics activities far beyond the fruits of the original understanding reached in the Atlanta Federal Penitentiary.

The Government had argued, as a preliminary matter, that evidence of conversations and meetings in 1973 relating to narcotics transactions was admissible by virtue of the holding in United States v. Dennis, 183 F.2d 201 (2d Cir., 1950), Aff'd. 341 U. S. 494 (1951). For easy reference, See Government's trial memorandum "Trial Memorandum in Support of the Admissibility of Evidence of Certain Acts and

Declarations of Co-Conspirators in 1973" (Exhibit B, Appendix).

The Government's interpretation of the Dennis holding might either before or after the time period of the conspiracy are per se admissible. But that is not the case, since the rule enunciated by Judge Hand still subjected any such testimony to tests of remoteness and relevance. (Dennis, supra. at P. 232). Thus, the government's position that

"For purposes of determining whether or not evidence of declarations of conspirators is admissible, the issue is simply whether or not as a matter of fact the conspiracy existed when the declarations were made, and not whether the declaration was made within the time period alleged in the indictment. . . ." (emphasis supplied).

is not and should not be, the law in this Circuit.

What the Government is asking this Court to do is to permit any testimony about conversations and meetings of admittedly similar types of offenses to fall within the ambit of the conspirator's exception to the hearsay rule to be admissible; it attempts to avoid the natural limits of its own accusations by extending the time period beyond dates alleged in indictment, and thereby to convict individuals based on the assumption that subsequent conversations about similar topics (narcotics, as in this case), are admissible to prove a prior existing conspiracy. The evidence was

clearly not relevant to the existence of the original criminal understanding.

At Page 5 of its Memorandum, the Government argues on the basis of the holdings in Gruenwald v. United States, 353 U. S. 391, 401-2 (1957), and Krulewitch v. United States, 336 U. S. 440, 442 (1949), that the conspiracy charged in this case should be presumed to have continued until the arrest of the defendants in 1974, because of the absence of evidence that the conspiracy terminated prior to that year. On the basis of the entire record at trial, it is clear that, even if a conspiracy existed prior to 1973, it had splintered and dissipated by December 31, 1972, and that evidence about narcotics transactions and conversations occurring in 1973 revealed the existence, taken at its best, of other crimes and other conspiracies, and tended to demonstrate nothing more than the bad character of the appellant - but not his involvement in the prior-existing conspiracy.

On the basis of that theory, the Court permitted the introduction of testimony about other criminal conspiracies. These included a conspiracy to import heroin from France into Canada, the exchange of money and narcotics to occur there - made between, according to witness Perna - appellant Anthony Stassi, Perna and his partner, Malizia. Sorenson was also

said to have a role in that separate conspiracy.

Another separate and distinct criminal conspiracy about which evidence was introduced was the conspiracy to harbor the fugitive Joseph Condello. Even under the Krulewitch rationale no reason appears for the admission of this testimony.

The Government further argued that even if the Court were to find that the conspiracy terminated in December, 1972, ". . . proof of actions of defendants and conspirators in the conduct of a similar joint venture to import heroin after the termination of the conspiracy would be admissible to establish that the conspiracy charged was, in fact, in existence and was participated in by the defendants." In support of this proposition, the Government cites Anderson v. United States, 417 U. S. 211, 219 (1974); Lutwak v. United States, 344 U. S. 604 (1953); United States v. Super, 492 F.2d 319, (2d Cir. 1974); United States v. Nathan, 476 F.2d 459-60 (2d Cir. 1973).

This theory advanced by the Government does not have the support the government claims either in the cases cited or in any other materials. Rather, Justice Marshall stated the theory of admissibility in Anderson, citing the Lutwak holding as precedent:

"Thus the Court concluded in Lutwak that acts of one alleged conspirator

could be admitted into evidence against the other conspirators, if relevant to prove the existence of the conspiracy, even though they might have occurred after the conspiracy ended. 344 U. S. at 618 The prosecution was entitled to prove the underlying purpose and motive of the conspirators in order to convince the jury, beyond a reasonable doubt, that petitioners had in fact unlawfully conspired to cast false votes in the elections. See Lutwak v. United States, supra, at p. 617."

The facts of Anderson are distinctly different from the facts at hand. At issue in that case was the admissibility of evidence about a conspiracy to cover up the earlier crime - a consequence clearly related to the original conspiracy and flowing naturally from it. In the instant case, admissibility of evidence about new and separate conspiracies to import narcotics was the question presented to the Court. The Lutwak and Anderson cases concerned well-defined fact patterns, very specific periods of time, and clear relevance to the existence of the conspiracy charged. Support for that theory comes in United States v. Super, a narcotics case involving a second transaction almost part and parcel of the first narcotics transaction. Immediately upon completing the sale of narcotics to the undercover agent, the defendant proposed an additional sale, and negotiations proceeded for a second sale within seconds of the completion of the first one. Evidence

of the additional negotiations was held admissible.

The facts of the instant case are distinguishable from the Nathan-Super rationale. The Government asks this Court to read those cases more broadly than they were intended, and failed to distinguish between "Acts" and "Declarations" as the case law requires:

"True, there is dictum in Logan v. United States, 144 U. S. 309 . . . which would limit the admissibility of both acts and declarations to the person performing them. This statement of the rule overlooks the fact that the objection to the declarations is that they are hearsay. This reason is not applicable to acts which are not intended to be a means of expression. The acts, being relevant to prove the conspiracy, were admissible, even though they might have occurred after the conspiracy ended."

Appellant Sorenson takes the position that these hearsay declarations are admissible, if appropriate, only against the declarant, not against all parties. A cursory examination of the transcript demonstrates beyond any doubt that this distinction was not made. The evidence came in unnumbered by the necessary cautionary instructions.

Super is distinguishable from the case at bar on other grounds. First, the parties' roles changed by 1973 - it is not clear whether Mario Perna or William Sorenson were

or were not part of the subsequent narcotics deals and which of the unindicted co-conspirators were part of the 1973-4 discussions about importing narcotics. Moreover, many months passed between conversations and plans - a highly attenuated time period compared to the immediate negotiations occurring in Super. The uncertainty of the deal, the lack of consummation of its alleged purposes, and the attenuated time period all work to disallow the operation of the remoteness doctrine enshrined in Dennis, supra.

The Nathan case also is distinguishable from the case at bar. Again, the Government made no clear distinction between the admission of acts and declarations, although Nathan, supra, deals with a clearly defined activity - the exchange of large sums of cash. Thus, Nathan, as does Super, permit the admissibility of evidence of acts, and not declarations. The Court's opinion sets forth the rule with greater clarity:

"Since the heroin was real evidence, its admissibility is governed by the rule, stated in Lutwak v. United States, 344 U. S. 604, 618 (1963) that though hearsay declarations of a co-conspirator are admissible against the others only if made during and in furtherance of the conspiracy, acts relevant to prove the conspiracy are admissible even if they occurred after the conspiracy ended, supra at p. 893.

The testimony admitted about 1973-4 meetings and conversations did not consist of testimony about "acts relevant to prove the existence of the conspiracy". Rather, it was testimony relevant to the existence of separate conspiracies and relevant to the bad character of the accused, but not at all relevant to prove the existence of the prior charged conspiracy - the crimes resulting from the original criminal understanding.

Therefore, the appellant Sorenson is entitled to a new trial, excluding the inadmissible evidence about 1973 discussions about the importation of narcotics.

POINT II

WHETHER THE COURT ERRED IN REFUSING TO GRANT A NEW TRIAL BECAUSE OF PROOF ELICITED BY THE GOVERNMENT OF MULTIPLE CONSPIRACIES, WHICH PROOF CONSTITUTED A DENIAL OF SUBSTANTIAL RIGHTS OF APPELLANT TO A FAIR TRIAL ON THE CONSPIRACY CHARGED IN THE INDICTMENT.

The acts concerning narcotics traffic during the years 1973 and 1974, evidence of which was admitted in great quantity by the Court, constituted proof of a number of conspiracies between appellant, government witnesses, and other parties, which went far beyond the particular conspiracy

charged in the indictment.

These other conspiracies included, but are not restricted to, the following separate criminal transactions:

1. A conspiracy to harbor government witness Joseph Condello in October, 1973, when he was a fugitive from justice and stayed at the apartment belonging to appellant Sorenson for two weeks. Evidence of this conspiracy came from witnesses Perna, Verzino, Condello, and Agent James Bradley. It included a meeting at the home of appellant between appellant, Perna, Condello, Malizia and others, called for the express purpose of rendering assistance to Condello, both in the form of shelter (Sorenson's contribution) and money (Perna's and Malizia's contribution). The government also introduced evidence of conversations about disparate narcotics transactions that occurred at Sorenson's house at that time.

2. A separate and distinct conspiracy between appellant, appellant Anthony Stassi, witness Mario Perna, the absent Ernest Malizia, and others, to import heroin from France in the spring of 1973, almost two years after the last shipment of heroin was received under the original conspiracy. This conspiracy included, according to testimony, appellant Anthony Stassi, witness Mario Perna, appellant William Sorenson, Ernest

Malizia, Joseph Condello, and others. Its purposes were discussed at two meetings in restaurants in Brooklyn in April, 1973. The plan was to import heroin to Canada, then pick it up in that country and smuggle it into the United States.

3. A separate and distinct conspiracy between appellant Anthony Stassi and witness Mario Perna to import heroin from France. This conspiracy allegedly included appellant William Sorenson. According to testimony, Mario Perna paid appellant Anthony Stassi \$25,000 in advance of any delivery of heroin, so called "front money". There was no evidence that Perna ever received back any of that money from appellant Stassi. It is clear that no heroin was ever actually delivered or received in line with its purposes.

4. A separate and distinct conspiracy between witness Mario Perna and Ernest Malizia to purchase and distribute heroin in large quantities, started in February, 1973. While appellant Sorenson was never a partner of the two men, he was said to have been present when the partnership was formed and, according to testimony, took a hand in bring Perna together with Malizia.

5. A separate conspiracy between appellant Sorenson and witness Perna to purchase and distribute narcotics. (226-7). This was the meeting at Sorenson's house called to assist

Joseph Condello, who was fugitive from Justice at the time; Perna asked Sorenson if he had any goods, and Sorenson replied that he knew someone who was in possession of "cut", i. e., diluted heroin, and named a high price, according to Perna.

While the Court, upon counsel's motion for a mistrial, permitted the Government to withdraw the question (which parenthetically would have remained in the record had counsel failed to raise timely objection), the jury heard the testimony; its appearance at trial undoubtedly contributed to the poisoned atmosphere affecting the defendant's rights to a fair trial on the original conspiracy charged.

What the Government did prove, by testimony such as this, was a series of separate, distinct, acts of narcotics transactions over a period of time. The Government did prove the bad character of the appellant by proving acts other than those relating to the conspiracy allegedly formed at the Atlanta Federal Penitentiary.

6. The arrest of witness Anthony Verzino in possession of twenty-six pounds of heroin, which heroin came from sources other than appellant Sorenson or any other defendant on trial;

7. A conspiracy to murder appellant Sorenson by witness Mario Perna which was "for personal reasons".

8. A conspiracy to distribute narcotics involving Albert Pierro (Albaduce) and Ernest Malizia involving several loads of heroin and one-half million dollars in cash (193).

9. A cocaine conspiracy participated in by witness Mario Perna (232).

10. Large gambling debts owed by appellant Anthony Stassi to Ernest Malizia stemming from racetrack betting (202-8).

The effect of the voluminous testimony elicited by the Government during the 1973-4 period (See also Point I), was to poison the mind of the jury in its analysis of the evidence about the particular conspiracy charged in the indictment. 1973 evidence was so damaging to the appellant that it was beyond the realm of any possibility for any jury to disregard the conclusion to be drawn from the government's case: that appellant was a person of bad character indeed, engaged in a steady course of criminality, involving many kinds of narcotics activities.

To refuse a mistrial or to refuse to grant a new trial on this issue was error. As was stated by Judge Friendly of this Court:

"The basic difficulty arises in applying the 17th Century notion of conspiracy, where the gravamen

of the offense was the making of an agreement to commit a readily identifiable crime or series of crimes such as murder or robbery ... to what in substance is the conduct of an illegal business over a period of years. There has been a tendency ... "to deal with the crime of conspiracy as though it were a group of persons, rather than as an act of agreement...."
United States v. Miley, 336 F. 2d. 376 at p. 384 (2d. Cir., 1964).

The multiple nature of the conspiracies here differs significantly from those described in Kotteakos v. United States, 328 U.S. 150 (1946) and United States v. Sperling, 506 F. 2d. 1323, 1340 (2d. Cir., 1974). There is reflected, rather, a series of criminal transactions many of which are similar in nature - i.e., involving narcotics - but which do not stem from the same, charged, act of criminal agreement. The conspiracies proven or introduced into evidence by the government are wholly separate, discrete criminal acts, and are especially distinct from the original agreement allegedly reached at the Atlanta Federal Penitentiary, which had taken its last delivery in June, 1971, by the very best interpretation of the government's evidence.

In its most recent pronouncement on this issue, this Court condemned the Government's practice of merging "several conspiracies for the sake of convenience." United States v. Bertollotti, 75-1107, Slpp Opinion #6419, 2d Cir. 1975.

The Bertollotti Court would therefore inquire as to whether the evidence reflects a "primarily ongoing business venture or a series of separate transactions and agreements".

On the facts, the instant case is similar indeed to the four separate conspiracies the Court found in Bertollotti. There was a swindle of money in that matter as there was here in Perna's payment of \$25,000 to Anthony Stassi, for which he never received either heroin or money.

There is a series of separate narcotics transactions woven together in the Government presentation on the basis of association of individuals in 1973 and 1974 - well after the last shipment of heroin was received.

Accordingly, appellant Sorenson requests that a new trial be granted, to be conducted without the introduction of evidence of multiple, separate conspiracies.

POINT III

WHETHER GOVERNMENT EXHIBIT I, THE PROSECUTION'S WRITTEN AGREEMENT WITH WITNESS MARIO PERNA IS UNCONSCIONABLE, AND VIOLATED THE RIGHTS OF THE APPELLANT TO A FAIR TRIAL, PARTICULARLY WHEN THE PROSECUTING ATTORNEY, IN HIS CLOSING SUMMATION, ARGUED THAT THE JURY SHOULD CONCLUDE THAT WITNESS PERNA WAS TELLING THE TRUTH IN HIS TESTIMONY BECAUSE TO DO OTHERWISE WOULD VOID HIS AGREEMENT WITH THE GOVERNMENT.

It is submitted that the agreement between the government and witness Mario Perna is unconscionable in the manner in which it was used, and in the manner in which the provision requiring the witness to tell the truth "in the opinion of the Government". This provision, objected to in timely fashion by appellant Sorenson, became the fulcrum by which the Government was able to argue, in the summation delivered by Mr. Nesland, the Assistant United States Attorney in charge of prosecuting the matter, that the jury should conclude that witness Perna was telling the truth, since to do otherwise would void his agreement with the United States.

The practice reflected in the record is a classic example of a bootstrapping technique, of employing otherwise admissible agreements and their provisions to enable the Government to do indirectly, in comment, what it would not

otherwise be able to do directly, i. e., to vouch for its witnesses. The trial record (3669-3670) reflects an unconscionable use of the terms of the agreement to bolster the credibility of the government witnesses. The comments made by the prosecutor in this case differ substantially from those found acceptable in other attacks on government attempts to bolster witness believability. See, e. g., United States v. Isaacs, 493 F.2d 1124 (7th Cir.), (per curiam, Lumbard, J., sitting by designation), cert. denied 417 U. S. 976 (1974), in which comment attacked was "those were the terms. In return for his truthful testimony, the charges against William Miller in this case would be dismissed." See also, United States v. Aloï, 511 F.2d 585 (2d Cir. 1975), cert. denied 44 U. S. L. W. 3344 (Dec. 8, 1975).

While the introduction into evidence of certain types of agreements has been sustained in this jurisdiction [United States v. Koss, 506 F.2d 1103 (2d Cir. 1974), cert. denied 421 U. S. 911 (1975)], the terms of the agreement in question here go far beyond those of Koss, and the use of the terms of the agreement in summation here went far beyond the bounds of fairness.

Accordingly, appellant Sorenson respectfully requests a new trial, with appropriate limitations on the use of the agreement made by the witnesses with the Government.

POINT IV

WHETHER THE COURT ERRED IN REFUSING
TO GRANT A MISTRIAL AFTER STATING
TO THE JURY:

THE JURY KNOWS THAT THE
PROSECUTION THINKS YOUR CLIENTS ARE
GUILTY OR THEY WOULDN'T HAVE BROUGHT
THE CASE. THE QUESTION IS WHETHER
THE PROSECUTION'S BELIEF IS CORRECT.
IT IS MERELY TELLING HIM THE AGENT
THINKS HE'S GOT A CASE. IT ISN'T
SOMETHING THEY DON'T KNOW.

Clearly, had the Government stated its own belief in the guilt of the defendants on trial, a violation of the Fair Comment Rule would have occurred. The statement made by the Court is even more serious. A jury reveres the words uttered by the trial Judge; it is sensitive to expressions of opinions by the Court, even though the jury is instructed that it is the final arbiter of the facts. United States v. Bloom, 237 F.2d 158 (2d Cir. 1958). Similarly, the court must not convey to the jury its belief in a defendant's guilt. United States v. Nazarro, 472 F.2d 302 (2d Cir. 1973). It must not give the jury the impression of partisanship. United States v. Curcio, 279 F.2d, 1960).

The reasons for the proscription are many, but this Court stated the issue succinctly in United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973), at p. 737:

Under any system of jury trials, the influence of the trial judge on the jury is necessarily and properly of great weight, and that his slightest word or intimation is received with deference, and may prove controlling.

An appellate court is required to consider not only the entire record at trial, but must engage in

a close scrutiny of each tile in the mosaic of the trial, so that we can determine whether instances of improper behavior, or bias, when considered individually or taken as a whole, may have reached that point where . . . the defendant was deprived of the fair trial to which he is entitled. Judge Kaufman, speaking in United States v. Nazarro, Supra., at p. 304.

Accordingly, the comment made by the Court about the prosecutions's belief in the guilt of the accused was the kind of comment which entitled the appellant to a new trial, conducted without the kinds of comments which affect the judgment of the triers of the facts.

POINT V

WHETHER THE COURT ERRED IN DENYING APPELLANT A NEW TRIAL WHEN, AFTER THE VERDICT AND BEFORE THE SENTENCE, IT WAS DISCOVERED THAT ALLEGATIONS OF SERIOUS WRONGDOING AGAINST AGENT JAMES BRADLEY HAD NOT BEEN FURNISHED TO THE DEFENSE BY THE PROSECUTION AS MATERIAL IN THE NATURE OF EXCULPATORY EVIDENCE.

Agent James Bradley was a central figure in the Government's investigation of this alleged crime. He was the agent who supervised informant Joseph Condello, arrested witness Mario Perna, assisted at the proceeding when witness Mastantuono identified a photograph of appellant Sorenson, and - in general, furnished the link between witnesses Perna, Verzino, and Condello on the one hand and witness Mastantuono on the other.

As counsel for appellant stated in summation:

"The connection between the one half and the other half are two threads. Two threads bind the first half to the second half. The first thread is the omnipresence of Agent Bradley, his presence at the photo identification made by Michel Mastantuono in February of 1975. It has been his baby all along.

I say to you that Agent Bradley is the tie that binds." (3763)

Conscious of the central role of the credibility of

this agent and of his importance to the Government case, counsel exhorted the jury to consider whether government agents were capable of making suggestion during an identification proceeding. (3772). On the question of the agent's motive, appellant argued to the jury that Bradley had attempted, unsuccessfully, to set Sorenson up for a narcotics transaction using the then informant Condello, and that Bradley was swayed in his own objectivity by the fact of Sorenson's criminal history. (3780-1). "It was Agent Bradley that was drawing the two halves of this event with relation to Mr. Sorenson closer together."

The government is obligated to furnish to the defense all exculpatory material. Brady v. Maryland, 373 U.S. 83 (1963).

Mr. Nesland knew that Agent Bradley had been involved in a shooting incident in New Jersey, causing injury to a schoolteacher wrongly identified as a narcotics trafficker (4092). A question of whether Bradley filed false charges against the schoolteacher was also raised.

The agent's credibility was a central factor in the case against Mr. Sorenson (4089-90) throughout the entire proceedings (4089-90). The withheld information was a potentially powerful searchlight of examining the truth as

maintained by appellant in his own argument throughout the case.

On this basis, appellant is entitled to a new trial, in full possession of the information damaging to the credibility of Agent Bradley.

POINT VI

WHETHER THE COURT ERRED IN ADMITTING IDENTIFICATION TESTIMONY OF GOVERNMENT WITNESS MICHEL MASTANTUONO AGAINST THE APPELLANT, BECAUSE OF SUGGESTION MADE DURING THE PHOTOGRAPHIC SELECTION PROCESS BY GOVERNMENT AGENTS, AND THEREBY DEPRIVING THE APPELLANT OF A FAIR TRIAL.

On November 3, 1975, during the trial, a hearing on identification was held in order to determine the fairness of the identification procedure by which government witness Michel Mastantuono, scheduled to give identification testimony, selected certain photographs. Mastantuono had selected photographs of the appellant, appellant Anthony Stassi, and defendant Charles Alaimo.

Mastantuono was shown photographs on or about February 15, 1975, and on March 3, 1975. On February 15, Agents Anthony Bochhchio and James Bradley were present. Bradley had supplied the photographs (1879), which were marked as government hearing exhibit 3. There were approximately fifteen photographs of different men.

Mastantuono went through all the photographs until the end*, then went through them again and made the selections.

* The next to the last photograph was that of appellant Anthony Stassi. Mastantuono had seen his photograph on many occasions, according to testimony. He was, by that time, very familiar with the likeness. The last photograph was difficult to distinguish.

Sorenson's photograph was displayed in unique fashion, according to the following testimony:

Q: Mr. Bocchichio, is there something peculiarly unique about the way the pictures of Bubie Sorenson and Anthony Stassi are put in exhibit 3, something different about those pictures than all the other pictures in the book?

A: Well, the photos are photocopies and they are loose and they just slide up in here". (1939).

Q: The only loose two photographs in the entire book, exhibit 3, are those of Anthony Stassi and Bubie Sorenson, the only two loose xerox copies?

A: Yes. (1940).

Thus, Sorenson's photograph was linked with that of a man whose photograph the witness had selected on many occasions. And the type of photograph it was, along with appellant Stassi's, differed from the rest of the pictures in the book.

Sorenson's photograph was also marked in unique fashion. It had writing that the other photographs did not have across the front. As the agent testified:

"On the top left hand corner it says Sorenson. On the bottom it says 244 72s (sic) Street; owns Evergreen Bar, 49th and Fifth; gold Olds 391 AES. No other photos had writing on the face". (1960).

This was the first occasion on which the witness had ever been shown any xerox copies of photographs. This variance from normal procedure may also have helped him to make his

selection. This difference is especially telling because the photos of Sorenson and Stassi were shown loose, unlike the remainder of pictures in the group.

When Mastantuono selected the picture, Agent Bradley, who was present, announced that "that is a photograph of Bubie". (1971). This comment was also impermissibly suggestive. As Agent Bocchchio testified:

Q: Mr. Mastantuono identified the xerox copy of that photograph and when he did that, did Mr. Bradley say that is a photo of Bubie?"

A: He said it to me and Mastantuono was sitting there.

(1972).

Bocchichio was not certain of the exact moment when Bradley made the comment "because I didn't see it until he turned towards me". (1972).

In addition, there was testimony that the photograph of Sorenson fell from the book to the table during the selection process, which would have made it that much more visible.

Even at that, Mastantuono was not entirely certain that the photograph he selected of Sorenson was a likeness of one of the men to whom he delivered loads of heroin. He was, according to the Agent, almost certain, but wanted to see a regular photograph (1880-1).

On March 3, Mastantuono was shown another array of photographs, marked government's hearing exhibit 2. He selected a glossy photograph of the appellant. This photo differed from the rest of the pictures in the display in that it had a large, noticeable smear across the face of the photograph. Even the Court admitted, in understated fashion, that "it seems stronger in that picture than the others". (1970). Counsel described the smear as being "quite distinct".

The earlier-selected photograph, in which selection was aided by subtle suggestion, made it possible for the witness to make the March 3 selection.

The suggestiveness in these photographs had to do with the quality of photographs, the differences in types of photographs shown to the witness, the linking of Sorenson's likeness with that of a man whom the witness had selected on many occasions and with which he was familiar, and with the comments made by Agent Bradley.

In United States v. Harrison, 460 F. 2d. 270 (2d. Cir., 1972), Cert. Denied 409 U.S. 861, this Court rejected a per se approach in determining questions of suggestion, and commented as follows:

"While it is true that a line-up of photographs may become impermissively suggestive when the distinguishing characteristics of the other persons shown, as compared with those of the suspect, are dramatically pronounced so that a witness who had seen the suspect only briefly on one occasion might well be influenced in making an identification by the unnecessarily striking difference in the photograph of the suspect [that] stand out from the others...." Harrison, supra, at p. 271.

See also Forster v. California, 394 U.S. 440 (1969); United States v. Abbate, 451 F. 2d. 990 (2d. Cir., 1971).

While a showing of impermissible suggestiveness need not lead to the exclusion of identification testimony (See U.S. v. Abbate, supra), the ultimate issue is whether the impermissible misidentification gave rise to a very substantial likelihood of irreparable misidentification. Neil v. Biggers, 409 U.S. 188 (1972). On this score, the Court will evaluate the likelihood of misidentification by weighing such external factors as the opportunity of the witness to view the criminal at the time of the crime, his degree of attention, the accuracy of the prior description given by the witness (none here), and the length of time between the crime and the confrontation. United States ex. rel. Cannon v. Montanye, 486 F. 2d. 263, 267 (2d. Cir., 1973).

In that light, the Court erred in admitting Mastantuono's identification testimony. He had never described anyone later said to be Sorenson. Over four years had passed since the

June, 1971, heroin delivery. The time and opportunity for viewing the suspect were short. He said he saw Sorenson driving one of the Cadillacs and standing near the car at the garage. His initial viewing, if it occurred, was brief indeed. Finally, he had remained awake for long hours, and had just completed a long driving journey from Montreal at the time of the crime. He was fatigued.

This point is especially significant because Mastantuono, far from identifying Sorenson at the second delivery, originally told the authorities - under oath - that he had delivered the June, 1971, shipment of heroin to an entirely different group of men, a group not including appellant Sorenson and appellant Stassi. It was about the time of this photographic selection that the witness changed his story.

Accordingly, appellant Sorenson respectfully requests a new trial, held without the tainted identification of government witness Mastasntuono.

POINT VII

WHETHER THE COURT ERRED IN REFUSING TO GRANT A MISTRIAL WHEN, AFTER, WITHOUT ANY NOTICE FROM THE GOVERNMENT, TWO LAW ENFORCEMENT OFFICIALS ENTERED THE COURTROOM TO ESCORT THE GOVERNMENT WITNESS Malfetta TO THE WITNESS STAND.

Toward the end of the Government's case, witness Malfetta, a New York City Police Department Detective, was called to testify about occasions on which he had seen appellant Sorenson and indicted conspirator Carmine Consalvo in conversation during the year 1974. Witness Malfetta entered the courtroom, escorted by two Police Department bodyguards,* who accompanied the witness to the stand. The two men walked directly past the jury box, rather than taking seats in discreet fashion in the spectator's section of the courtroom.

This episode was extremely prejudicial to appellant Sorenson. On several occasions during the trial, the defendants - individually and through counsel - informed the Court that they were sensitive to members of the jury seeing them in custody of United States Marshals. Responding to this, the Court took whatever precautions where possible to avoid the

*Witness Malfetta was in protective custody at the time.

prejudice that might be incurred by appellants Sorenson and Joseph Stassi; the marshals were stationed in and around the courtroom in a fashion to avoid inflaming the already high feeling in the Courtroom that lasted throughout the trial. The danger implicit in the episode was stated specifically by witness Condello, who testified that he was in physical fear of the accused defendants on trial.

Appellant Sorenson would request that a new trial be granted, at which time the Government could assure that this unfortunate and prejudicial incident not be repeated.

A defendant's right to a fair trial should be jealously guarded for the benefit of the accused, especially in circumstances where feeling runs high. What is error under some circumstances and would not be grounds for reversal, should not be brushed aside in other circumstances of a compelling nature. Glasser v. United States, 315 U. S. 60 ().

While no cases on point are available to counsel, it is clear that

"Handcuffs or manacles on a defendant in the presence of a jury during his trial may, under particular circumstances, be prejudicial to him. The disposition of such matters is, however, ordinarily left to the sound discretion of the Trial Court. Guffey v. United States, 310 F.2d 753 (10th

Cir. 1962). DeWolf v. Waters, 205
F.2d 234 (10th Cir.) cert. den.
346 U. S. 837.

While the Court had no control and had no advance notice of this abuse of fair procedures, the witness was in control of the Government, and the Government well knew that he was accompanied by bodyguards. In these circumstances, the Court erred in not granting a mistrial when these bodyguards appeared in the fashion they did. As was said in Way v. United States, 285 F.2d 253 (10th Cir. 1960):

It is the general rule that under ordinary circumstances freedom from handcuffs, shackles, or mistreatment of a defendant during the trial of a criminal case is an important component of a fair and impartial trial.

Therefore, for all the foregoing reasons, a motion for a new trial should be granted.

POINT VIII

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, THE APPELLANT SORENSON ADOPTS BY REFERENCE THE POINTS AND ARGUMENTS MADE BY THE OTHER APPELLANTS INSOFAR AS THEY MAY HAVE APPLICATION TO HIM.

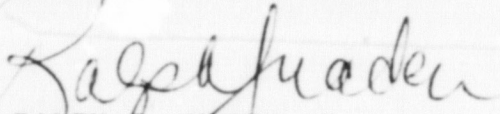
Appellant Sorenson adopts all other points and arguments of other appellants that may have application to him. In so doing, it should be stated that this includes, but is not restricted to, the argument of appellant Joseph Stassi on the issue of the deportation of Jean-Claude Otvos by the Government in early 1975.

That issue has particular relevance to appellant Sorenson since he was an inmate of the Atlanta Federal Penitentiary at the time of the alleged conspiracy and because of the peculiar relationships between all parties in the case revealed as the evidence developed.

CONCLUSION

For the foregoing reasons, the judgment must be reversed and the case remanded to the District Court for a new trial.

Respectfully submitted,



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Brief and Appendix

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